NO. 86-6889

IN THE SUPREME COURT OF THE UNITED STATES

MARCH 1986 TERM

DONALD DUFOUR,

Petitioner

VERSUS

STATE OF MISSISSIPPI,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE

SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I.

WHERE THE COURT BELOW FOUND PETITIONER TO HAVE RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL UNDER A PROPER APPLICATION OF STRICKLAND V. WASHINGTON, CERTIORARI SHOULD BE DENIED.

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PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF IN OPPOSITION

Respondent, State of Mississippi, respectfully prays that the Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi be denied in this case.

II. OPINION BELOW

The opinion of the Supreme Court of the State of Mississippi is reported as Dufour v. State, 483 So.2d 307 (Miss. 1985). A copy of the opinion is before the Court as Exhibit A to petitioner's Petition for Writ of Certiorari to the Supreme Court of Mississippi.

III. JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of a Petition for Writ of Certiorari through the authority of 28 U.S.C. § 1257 (3). He fails to do so.

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

Petitioner seeks to invoke the provisions of the Constitution of the United States, Amendments V, VI, VIII, and XIV. Respondent relies on Section 99-39-1, et seq., Miss. Code Ann. (Supp. 1984).

V. STATEMENT OF THE CASE

Petitioner appears before this Court as a result of his conviction and resulting death sentence in the Circuit Court of Hinds County, Mississippi, First Judicial District. This conviction and sentence grew out of the October 13, 1982 robbery and murder of Earl Wayne Peeples and Danny Earl King. Petitioner was indicted for this crime on November 5, 1985. Petitioner's trial began on March 28, 1983, Honorable Reuben V. Anderson, Circuit Judge presiding. At the conclusion of the sentencing phase the jury returned a sentencing verdict of death, finding that the following aggravating circumstances existed:

We the jury, unanimously find that the aggravating circumstances of :

> 1. The capital offense was committed while the defendant was engaged in the commission of or an attempt to commit the crime of robbery for pecuniary gain.
>
> 2. The capital offense was especially heinous, atrocious and cruel.

On April 11, 1983, defendant filed a motion for new trial raising twenty-one (21) grounds for relief. A summary order denying such was entered on April 12, 1983. On this automatic appeal to the Mississippi Supreme Court petitioner raised the following claims:

On direct appeal:

> 1. The trial court erred in refusing the appellant's request to hire an investigator.
>
> 2. The trail court erred in excusing for cause Jamie Honeycutt because of her beliefs regarding the death penalty.

3. The trial court erred in excusing for cause Pamela Summers in violation of the Witherspoon Rule.

4. The trial court erred in refusing to exclude Gerald H. Bagwell for cause.

5. The trial court erred in admitting certain pictures depicting the deceased in gruesome aspect, which pictures were cumulative, had no other purpose than to inflame the jury against the defendant, and connected the defendant with another crime for which he was not being tried.

6. The trial court erred in admitting pictures of screwdrivers not used in commission of the crime.

7. The state failed to prove the essential elements of the crime of robbery.

Appellant's Assignments of Error.

On June 6, 1984 the court below unanimously affirmed the conviction and sentence entered by the Hinds County jury. A petition for rehearing was filed and subsequently denied on July 25, 1984. Dufour v. State, 453 So.2d 337 (Miss. 1984).

Petitioner then filed with this Court a Petition for Writ of Certiorari to the Mississippi Supreme Court. This petition stated in the Questions Presented section the following:

1. Whether petitioner's right guaranteed under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution were violated by the exclusion of prospective jurors who did to express unequivocally that they would automatically vote against the death penalty in petitioner's case?

a. Whether the trial court properly excluded jurors on the basis of ambivalent and contradictory statements concerning their ability to vote for the death penalty?

b. Whether the trial court properly excluded a prospective juror solely because she expressed reluctance to vote for the death penalty in a case in which the state's evidence consisted primarily of a co-defendant's testimony?

2. Whether petitioner's Sixth and Fourteenth Amendment rights to effective assistance of counsel, due process of law and equal protection of the laws were violated by the trial court's refusal to provide petitioner with investigative assistance

for the purpose of obtaining evidence in support of his defense and in mitigation of punishment where petitioner was indigent and charged with a capital offense?

Petition for Writ of Certiorari, No. 84-5626.

In due course that petition was denied on February 19, 1985. Dufour v. Mississippi, ___ U.S. ___, 84 L.Ed.2d 368, ___ S.Ct. ___ (1985). Petitioner then petitioned for a rehearing of his case before this Court. The Court denied his petition for rehearing on April 1, 1985.

Upon denial of the writ of certiorari and rehearing the petitioner filed a Motion To Vacate Judgment And Sentence. In this motion petitioner made the following claims:

A. Petitioner Was Deprived of His Right To Effective Assistance of Counsel.

1. Failure to Investigate and Present Mitigating Witnesses.

2. Failure to Investigate, Obtain and Present Psychiatric or Psychological Evidence

3. Trial Counsels Failure To Request Instructions On Lesser Included Offenses and Elements of the Primary Offense Charged

4. Failure To Object To Prosecutorial Misconduct

5. Failure to Adequately Cross-Examine State's Witness

6. Failure To Object To Improper Evidence of Other Crimes

7. Failure To Make An Adequate Request For Investigative Services

8. Failure to Present Errors on Appeal

B. Presistent Prosecutorial Misconduct Rendered The Trial and Sentencing Fundamentally Unfair

C. [no claim so designated]

D. Failure To Give Instructions On Lesser Included Offenses

E. Failure To Give Instructions On Essential Element of the Crime

F. Inadequate Sentencing Instructions

G. Failure to Narrow Class of Death Eligibility

H. [1] Prosecution-Prone Jury

H. [2] Failure to allow Access to Expert Assistance

Application For Leave To File Motion To Vacate Or Set Aside Judgment And Sentence

On December 18, 1985, the Supreme Court of Mississippi denied his post-conviction relief motion in a written opinion, a petition for rehearing was subsequently denied on February 26, 1986. Dufour v. State, 483 So.2d 307 (Miss. 1985). The present petition is taken from this denial.

VI. STATEMENT OF FACTS

The facts of this case are graphically and sufficiently set forth in the opinion of this Court. Dufour v. State, 453 So.2d at 338-40. They need not be restated here.

VII. REASONS FOR DENYING THE WRIT

PETITIONER HAS PRESENTED NO SUBSTANTIAL FEDERAL QUESTION THAT IS COGNIZABLE BY THIS COURT THEREFORE THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

ARGUMENT

I.

WHERE THE COURT BELOW FOUND PETITIONER TO HAVE RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL UNDER A PROPER APPLICATION OF STRICKLAND V. WASHINGTON, CERTIORARI SHOULD BE DENIED.

Petitioner presents three question, all of which revolve around the question of whether or not he received effective assistance of counsel. The first two questions dealing with the furnishing and use of mental health professionals has been factually decided against petitioner. The third deals with the presentation of mitigating evidence during the sentencing phase of the trial and was factually resolved against petitioner. These factual findings are entitled to due deference on this petition.Looking to the opinion of the court below we find that petitioner's claims here were the first addressed by the court below. The court below held:

> CLAIMS
> A.
>
> Petitioner was Deprived of His right to Effective Assistance of Counsel.
>
> (1) Failure to Investigate and Present Mitigation Witnesses.

> Petitioner claims that defense counsel failed to investigate whether there were any potential witnesses who could have presented favorable testimony as to why he deserved to have his life spared. Petitioner's counsel, R.L. Houston, talked with petitioner's brothers in Florida on several occasions, although they state in their affidavits that they cannot recall speaking to the Jackson attorneys. They told Houston that they would not come to Jackson nor did they want to get involved in the trial of their brother's case. They refused to help petitioner at that time.
>
> (2) Failure to Investigate, Obtain and Present Psychiatric or Psychological Evidence.
>
> Petitioner claims that defense counsel failed to make application to the trial court for funds to conduct a psychological evaluation of petitioner for the purpose of determining whether mitigating circumstances existed. Further, that he had no expert assistance because counsel did not request it. However, petitioner was examined pursuant to a court order. The professionals were not people selected by the State, but by the trial court. Petitioner has failed to present facts which show there existed mitigating circumstances of a psychological nature, which could have been presented by Dr. Stanley. It is not shown that such an examination would have produced the claimed results, nor has prejudice been shown.
>
> 483 So.2d at 308.

The state court after considering and disposing of petitioner's other claims on ineffectiveness concluded:

> The nine (9) claims hereinabove, which relate to the total claim of ineffective assistance of counsel must be considered, singly and collectively, after applying the standards set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984).
>
> . . .
>
> We are of the opinion that the petitioner has not demonstrated that his claims of ineffective assistance of counsel have met the two-pronged test of Strickland v. Washington, supra, viz, (1) counsel's performance was deficient to the extent that he made errors so serious that counsel was not functioning as the "counsel" guaranteed the petitioner by the Sixth Amendment, and (2) the deficient performance prejudiced the defense to the extent that counsel's errors were so serious as to deprive petitioner of a fair trial, a trial whose result is reliable.
>
> 483 So.2d at 309-11.

It is clear that the court below applied the proper standard in determining whether or not petitioner received effective assistance of counsel. Strickland, does not require but one standard of prejudice when considering claims of ineffectiveness.The standard of prejudice employed for &nswering questions arising from counsel's failure to secure psychiatric or psychological experts to seek for mitigating evidence is the same as for any other real or imagined deficiency of counsel.

On the issue of ineffectiveness of counsel we not that this case is not factually unlike Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), where the claim was that counsel failed to present character and psychological evidence at the sentencing phase of his trial. The standard set forth there has been adopted by the court below in Stringer v. State, 454 So.2d 468 (Miss. 1984), and applied its rational in Wilcher v. State, 479 So.2d 710 (Miss. 1985); Leatherwood, 473 So.2d 964 (Miss. 1985), Thames v. State, 454 So.2d 486 (Miss. 1984); In Re Hill, 460 So.2d 792 (Miss. 1984); Ward v. State, 461 So.2d 724 (Miss. 1984) and Lambert v. State, 462 So.2d 792 (1984). Appellant has failed to meet the two pronged test set forth therein.

In its consideration of the prejudice prong in Strickland, the Court stated:

> With respect to the prejudice component, the lack of merit of respondent's claim is even more stark. The evidence that respondent says his trial counsel should have offered at the sentencing hearing would barely have altered the sentencing profile presented to the sentencing judge. As the state courts and District Court found, at most this evidence shows that numerous people who knew respondent thought he was generally a good person and that a psychiatrist and a psychologist believed he was under considerable emotional stress that did not rise to the level of extreme disturbance. Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed. Indeed, admission of the evidence respondent now offers might even have been harmful to his case: his "rap sheet" would probably have been admitted into evidence, and the psychological reports would have directly contradicted respondent's claim that the mitigating circumstance of extreme emotional disturbance applied to his case.
>
> 80 L.Ed.2d at 701.

The case at bar is no different. Petitioner was not from Mississippi, when contacted his relatives in Florida, one of them a lawyer, refused to come to his aid. They refused to come and testify as to his character or offer others who could do so. The simply did not want to get involved in the trial. Regarding the psychiatric or psychological evidence petitioner has done less than in Strickland, he has present the court below and this Court with nothing but conjecture. Dr. Stanley's affidavit states he was not requested to make any evaluation for "psychologically mitigating" circumstances. Therefore he "could not provide any psychological mitigating explanation for why Mr. Dufour would have committed the alleged crimes, if such explanation does exist." It is interesting to note that petitioner is presently under the sentence of death and a sentence of life imprisonment for three murders in the state of Florida. The facts and circumstances surrounding those three murders are similar to the ones of the case at bar. Prior to the trial in which petitioner received the death sentence in Florida, he was fully examined by defense selected psychiatric and psychological experts. They issued a report to defense counsel. I am sure that that report is available to present counsel and could have been presented to the court below as evidence in support of their theory. No such report was presented to the court below. One must presume that it was not favorable to petitioner's position here. Strickland at least presented the Court with something on which to base such a claim. There has to be some indication that there is something to be gained in this area before it even becomes significant in the determination of attorney competence.

Petitioner relies on Ake v. Oklahoma, 470 U.S. ____, 84 L.Ed.2d 53, 106 S.Ct. ____ (1985), in support of his claim of ineffectiveness. However Ake does not offer petitioner solace. The holding in Ake, is two fold. First the Court held:

> We therefore hold that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own.
>
> [Emphasis added] 84 L.Ed.2d at 66.

The secondly and more importantly as it relates to this case, the Court held:

> Ake was also denied the means of presenting evidence to rebut the State's evidence of his future dangerousness. The forgoing discussion compels a similar conclusion in the context of a capital sentencing proceeding, when the State presents psychiatric evidence of the defendant's future dangerousness.
>
> . . .
>
> In addition, Ake's future dangerousness was a significant factor at the sentencing phase. The state psychiatrist who treated Ake at the state mental hospital testified at the guilt phase that, because of his mental illness, Ake posed a threat of continuing criminal violence. This testimony raised the issue of Ake's future dangerousness, which is an aggravating factor under Oklahoma's capital sentencing scheme, Okla. State. Tit 21, $ 701.12(7) (1981), and on which the prosecutor relied at sentencing. We therefore conclude that Ake also was entitled to the assistance of a psychiatrist on this issue and that the denial of that assistance deprived him of due process.
>
> [Empahsis added] 84 L.Ed.2d at 67-68.

It is clear that Ake, has no application here as petitioner's sanity was never in question nor was any evidence introduced concerning petitioner's future dangerousness. The fact of the matter is that evidence of future dangerousness can no longer be

introduced at the sentencing phase of a capital murder trial in Mississippi. Williams v. State, 445 So.2d 798, 813 (Miss. 1984); Wiley v. State, 449 So.2d 756, 761-62 (Miss. 1984). There being no psychiatric or psychological testimony by the state to rebut there is no Ake violation and therefore no ineffective assistance of counsel in this case.

One further matter needing to be addressed is that petitioner clearly misleads the Court when he cites Davis v. State, 374 So.2d 1293 (Miss. 1979); Phillips v. State, 197 So.2d 241 (Miss. 1979) and Laughter v. State, 235 So.2d 468 (1970), for the proposition that prior to petitioner's trial Mississippi precedent indicated that indigent defendants did not have a right to the assistance of mental health professionals at trial. This is simply not true. We only have to look to the opinion on direct appeal of this case to find that petitioner grossly mistates the law. Davis stands for the proposition that "the determination of furnishing the indigent accused any expert, other than psychiatric, would be made on a case by case basis." Dufour v. State, 453 So.2d 337(Miss. 1984). Mississippi has long recognized the right to assistance of mental health professionals at trial at state expense.

Respondents recognize that the Sixth Amendment guarantees criminal defendants the right to assistance of counsel. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Concomitantly, the Sixth Amendment requires effective assistance of counsel. In Strickland v. Washington, the Court articulated the above cited two prong test to be used in determining whether or not counsel's performance meets constitutional muster in the following words:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so

> serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.
>
> 80 L.Ed.2d at 693.

A petitioner who seeks to overturn his conviction or sentence on grounds of ineffective assistance of counsel has the burden to demonstrate by sufficient factual proof by a preponderance of the evidence, an identifiable lapse on the part of counsel, as well as some actual adverse impact upon the fairness of the trial which results from the lapse. Daniels v. Maggio, 669 F.2d 1075 (5th Cir 1983); Boyd v. Estelle, 661 F.2d 388 (5th Cir. 1981); Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981). The determination of whether counsel renders reasonably effective assistance turns in each case on the totality of the facts in the entire record. Washington v. Estelle, 648 F.2d 276 (5th Cir. 1981). In doing so the reviewing Court must take into consideration the strength of the State's case. In Strickland, supra, the Court summarized this inquiry thusly:

> More specific guidelines are not appropriate. The Sixth Amendment refers simply to "counsel," not specifying particular requirements of effective assistance. It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. See Michel v. Louisiana, 350 U.S. 91 100-1001 (1955). The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.
>
> Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. See Cuyler v. Sullivan, supra, at 346. Form counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. See Powell v. Alabama, 287 U.S., at 68-69.

> These basic duties neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance. In any case presenting an ineffectiveness clai , the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. See United States v. Decoster, 624 F.2d, at 208. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause. Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.
>
> 80 L.Ed.2d at 693-94.

Likewise, judicial scrutiny of counsel's performance must be highly deferential. A fair assessment of an attorney's performance requires every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Washington v. Watkins, supra. "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland, 80 L.Ed.2d at 694-695, citing Michael v. Louisiana, 350 U.S. 91, 100 L.Ed.2d 83, 76 S.Ct. 158 (1955).

The claims presented here fall within what the Supreme Court referred to a "sound trial strategy". In this context the Court stated in Strickland v. Washington, supra:

> Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionallly competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.
>
> These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case. As the Court of Appeals concluded, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.
>
> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defenses are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or

> even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions. See United States v. Decoster, 624 F.2d, at 209-10.

[Emphasis added] 80 L.Ed.2d at 695-96.

See also: Gomez v. Beto, 462 F.2d 596 (5th Cir. 1972); Gaines v. Hopper, 575 F.2d 1147(5th Cir. 1978). Cf: Lovett v. State of Florida, 627 F.2d 706 (5th Cir. 1980); Washington v. Watkins, supra; Jones v. Estelle, 632 F.2d 490 (5th Cir. 1981); Beckham v. Wainwright, 639 F.2d 262 (5th Cir. 1981). Counsel is not required to pursue every path until it bears fruit or until all conceivable hope withers. Lovett v. State of Florida, supra.

Complaints concerning counsel's alleged failure to file certain motions, call certain witnesses, ask certain questions, make certain objections, and similar activites fall within the ambit of trial strategy. Murray v. Maggio, 736 F.2d 279 (5th Cir.1984); Solomon v. Kemp, 735 F.2d 395 (11th Cir. 1984).

The Supreme Court set out the test for the second prong of the inquiry into the effectiveness of counsel, that to determine actual prejudice as follows:

> Accordingly, the appropritate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution, United States v. Agurs, 427 U.S., at 104, 112-113, and in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness, United States v. Valenzuela-bernal, 458 U.S., at 872-874. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
>
> In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice,

"nullification," and the like. A defendant has no entitlement to the luck of a lawless decision maker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decision maker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decision maker, such as unusual propensities toward harshness or leniency. Although these facts may actually have entered into counsel's selection of strategies and, to that limited extent, may then affect the performance inquiry, they are irrelevant to the prejudice inquiry. Thus, evidence about the actual process of decision, if not part of the record of the proceedings under review, and evidence about, for example, a particular judge's sentencing practices, should not be considered in the prejudice determination.

The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a defendant challenges a conviction, the question is whether there is a reasonable doubt respect in guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer - including an appellate court, to the extent it independently reweighs the evidence - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and the factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

[Empahsis added] 80 L.Ed.2d at 698-99.

See also: Gomez v. McKaskle, 748 F.2d 1107 (5th Cir. 1984).

Petitioner's claim that his trial counsel did not investigate and present mitigation evidence during the sentencing phase of his trial and thereby rendered him ineffective assistance of counsel is likewise with out merit. Even though petitioner states that there is a constitutional duty to present mitigating evidence the courts have not so held. In fact the Eleventh Circuit held that there is no absolute duty to present mitigating character evidence. Mitchell v. Kemp, 762 F.2d 886, 889 (11th Cir. 1985). Petitioner's counsel, R. L. Houston, did talk with his brothers in Florida on several occasions, although they state in their affidavits that they cannot recall ever speaking with the Jackson attorneys. They told Houston that they would not come to Jackson nor did they want to get involved with the trial of their brother's case. They refused to come to petitioner's assistance at that time. Only now after the fact do they become concerned with their brother's welfare. Counsel often has to depend upon the information communicated to him by the defendant and his family. This can limit the scope of the independent investigation necessary for the attorney to make. Mitchell v. Kemp, supra at 889. Here petitioner gave counsel no one other than the brothers to contact and the brothers were unhelpful. It is not a mitigating circumstance that petitioner's brothers and family members would be affected by his death. That is irrelevant to the consideration of whether he should be sentenced to death or not as it is not eviedence of the particular background or character of petitioner nor is it evidence of the particularized factual circumstances surrounding the crime for which he was convicted. Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982); Skipper v. South Carolina, 476 U.S. ____, 90 L.Ed.2d 1, 106 S.Ct. ____ (1986). Because his brothers' refused to help petitioner in his time of need, he cannot now lay this at the feet of trial counsel. The

family had the opportunity to help and they refused. This does not make out a case of ineffective assistance of counsel. Nor does the failure to put on character evidence in mitigation. See Stanley v. Zant, 697 F.2d 955, 962-65 (11th Cir. 1983); Willimas v. Maggio, 679 F.2d 381 (5th Cir. 1982); Gray v. Lucas, 677 F.2d 1086 (5th cir. 1982). Stanley clearly holds that evidence tending to "humanize" a capital defendant is not constitutionally required. The effect of producing no mitigating evidence at all is explored in Adams v. Wainwright, 709 F.2d 1443, 1445-46 (11th Cir. 1983), and held not to be error.

The holdings in Griffin v. Wainwright, 760 F.2d 1512 (11th Cir. 1985); Briley v. Bass, 750 F.2d 1238, 1248 (4th Cir. 1984); Celestine v. Blackburn, 750 F.2d 353, 356-58 (5th Cir. 1984); Burger v. Kemp, 753 F.2d 930, 936-39 (11th Cir. 1985) and Stephens v. Kemp, 721 F.2d 1300, 1304 (11th Cir. 1983) all support the holding of the Mississippi Supreme Court that petitioner was not denied effective assistance of counsel at the sentencing phase of his trial. In Moore v. Maggio, 740 F.2d 308 (5th Cir. 1984), the Fifth Circuit applying Strickland, held:

> An error by counsel, eve if professionally unreasonable, does not require setting aside a defendant's conviction or sentence if the error had no effect on the judgment. Thus, it is insufficient for the defendant to show that counsel's errors had some possible effect on the verdict. "The defendant must show that there is a reasonable probability that, that but for the counsel's unprofessional errors, the result would have been different." 104 S.Ct. at 2068. The Court held that when a defendant challenges a death sentence, "the question is whether there is a reasonable probability that, absent the errors, the sentencer--including an appellate court to the extent that it independently re-weighs the evidence--would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." 104 S.Ct. at 2069.
>
> [Emphasis added] 704 F.2d at 315.

Petitioner has not shown even the mere possibility that the failure to present the evidence he now says should have been presented would have some effect on the verdict. He certainly has not shown that there is a reasonable probability that the inclusion of this evidence would have caused the balance of aggravating and mitigating circumstances not to warrant death. Petitioner fails to show here as he did below that he was rendered ineffective assistance of counsel.

CONCLUSION

For the above and foregoing reasons respondent respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marvin L. White, Jr., a Special Assistant Attorney General State of Mississippi, do hereby certify that I have this day causemailed, via United States Postal Service, first-class postage preptrue and correct copy of the foregoing Response to Petition for Writ of Certiorari to the following:

Bernard S. Grimm
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and

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This the 23rd day of July, 1986.

Marvin L. White, Jr.
MARVIN L. WHITE, JR.